

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Bright House Networks, LLC)	CSR-6938-E
)	
Petition for Determination of Effective)	
Competition)	

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 2007

Released: March 5, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order considers a Petition for Special Relief (“Petition”) that the cable operator, Bright House Networks, LLC (“Bright House”), filed with the Commission pursuant to Sections 76.7, 76.905(b)(2), and 76.907 of the Commission’s rules.¹ The Petition seeks a determination that, in two franchise areas in Florida,² Bright House is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended (the “Act”),³ and is therefore exempt from cable rate regulation. The City of Lake Alfred, Florida (“Lake Alfred”) and the Town of Dundee, Florida, filed Oppositions.⁴ Bright House filed a Reply. We find that Bright House is subject to effective competition in both franchise areas and, accordingly, we grant the Petition.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 623(l)(1) of the Communications Act⁶ and Section 76.905 of the Commission's rules.⁷ A cable operator bears the burden of rebutting the

¹ 47 C.F.R. §§ 76.7, 76.905(b)(2), 76.907.

² The “Franchise IDs” of the communities in question are FL0117 (Dundee, Florida) and FL0151 (Lake Alfred, Florida).

³ 47 U.S.C. § 543(a)(2).

⁴ Lake Alfred and Dundee filed a joint Motion for Extension of Time (“Motion”) seeking more time in which to prepare their Oppositions. The Motion cites a hurricane and other matters as justification for the extension. The Motion is granted.

⁵ 47 C.F.R. § 76.906.

⁶ 47 U.S.C. § 543(l)(1).

⁷ 47 C.F.R. § 76.905.

presumption that effective competition does not exist with evidence that it does exist in its franchise area.⁸

II. DISCUSSION

A. Competing Provider Effective Competition

3. Section 623(l)(1)(B) of the Act provides that a cable operator is subject to “competing provider” effective competition in a franchise area if two conditions exist in the area. The first is that the area is served by at least two unaffiliated multi-channel video programming distributors (“MVPDs”) each of which offers comparable video programming to at least 50 percent of the households there.⁹ The second is that the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.¹⁰

4. To satisfy the first part of the test for competing provider effective competition, Bright House produces evidence showing that the two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”), and EchoStar Satellite, L.L.C. (“EchoStar”), offer to at least 50 percent of the households in the franchise areas MVPD service that is comparable to Bright House’s.¹¹ To satisfy the second part of the competing provider test, Bright House offers evidence that it is the largest MVPD in the franchise areas.¹² Lake Alfred and Dundee do not dispute Bright House’s evidence about the DBS providers and they agree that Bright House is the largest MVPD.¹³ We conclude that DirecTV’s and EchoStar’s DBS services are comparable to Bright House’s, that they are offered to at least 50 percent of the households in each franchise area, and that Bright House is the largest MVPD in each franchise area.

5. Bright House asserts that potential subscribers in each franchise area are reasonably aware that they may purchase the DBS providers’ services. Bright House supports these assertions mostly with general, nationwide evidence – Commission findings and presumptions in many past decisions that the DBS services have a nationwide footprint¹⁴ and have engaged in “extensive national, regional and local advertising and marketing efforts through television and radio, Internet, print media and direct marketing.”¹⁵ Bright House also notes Commission findings that the DBS providers have tens of millions of subscribers to their services nationwide.¹⁶ Bright House also supports its claim that households in each franchise area are reasonably aware of DBS services by pointing to its evidence, which it also uses to establish the second part of the competing provider test, that substantial numbers of subscribers in each area actually do subscribe to those services.¹⁷

6. Lake Alfred and Dundee challenge the sufficiency of this evidence on the ground that almost nothing in it is specific to the franchise areas. Bright House, they correctly note, has produced no

⁸ See 47 C.F.R. §§ 76.906, 76.907(b).

⁹ 47 U.S.C. § 543(l)(1)(B)(i).

¹⁰ 47 U.S.C. § 543(l)(1)(B)(ii).

¹¹ Petition at 6-7; 47 C.F.R. § 76.905(g).

¹² Petition at 8.

¹³ Lake Alfred Opposition at 2; Dundee Opposition at 2.

¹⁴ Petition at 3 n.8.

¹⁵ *Id.* at 4-5 (with a footnote referencing the DBS providers’ web pages “where consumers can learn more about local retail outlets”).

¹⁶ Petition at 5; Reply at 2-3; see also *Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2503, 2758, ¶ 6, 2760, ¶ 13, 2793-94, ¶¶ 72-73 (2006).

¹⁷ Petition at 5; Reply at 1-3.

advertisements of the DBS providers' services in local newspapers or telephone directories or other facts tending to show that they offer DBS service in the franchise areas or that potential subscribers there, in particular, are aware of it.¹⁸ We disagree with Lake Alfred and Dundee. Over more than ten years, we have made hundreds of findings that households in particular franchise areas are reasonably aware that they may purchase DBS services based on localized evidence. These accumulated showings amount to substantial evidence that households in all franchise areas are reasonably aware that they may purchase DBS services. In at least one earlier reported decision, we found households in a franchise area to be reasonably aware that they may purchase DBS service solely based on evidence of DBS's nationwide growth and local subscriptions, without reference to advertising or other promotion.¹⁹ Nothing we have seen since then leads us to think that finding erroneous. Also convincing in this case is the complete absence of any evidence offered by Lake Alfred or Dundee that conditions in either of their franchise areas are different or that, due to some local peculiarity, households in either area are not reasonably aware that they may purchase DBS services. Our finding in this case is supported by the Commission's statement in 1993 that

"we do not believe that such awareness necessarily depends on whether the marketing of the competitive service occurs on a local, as opposed to a national, level. Catalog companies, for example, make their services available to customers nationwide by means of 800 numbers. We see no reason to require needlessly fractionalized marketing in order to ensure that a national or regional programming service is available in a particular community."²⁰

Accordingly, we find that Bright House has sustained its burden of proof that each franchise area is served by at least two unaffiliated MVPDs each of which offers comparable video programming to at least 50 percent of the households there.

7. With regard to the second prong of the competing provider test, Bright House asserts that it is the largest MVPD in each franchise area. Bright House seeks to establish competing provider effective competition based on the presence of the DBS providers there. This requires Bright House to show that households subscribing to the DBS providers' services in each franchise area amount to 15 percent or more of the households there.²¹

8. The Lake Alfred Franchise Area. The Lake Alfred franchise area lies in parts of two five-digit zip codes, 33850 and 33881. Bright House obtained a statement from the Media Business Corporation ("MBC") that those zip codes contain a combined 16,535 households;²² Census data indicating that the City of Lake Alfred contains 1,511 households;²³ and an Effective Competition

¹⁸ Lake Alfred Opposition at 3-4; Dundee Opposition at 3-4.

¹⁹ *Adelphia Commun.*, Memorandum Opinion & Order, 20 FCC Rcd 7503, 7504, ¶ 3 (2005) ("In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in each of the communities listed on Attachment A are DBS subscribers, we conclude that the population of communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test.").

²⁰ *Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992; Rate Regulation*, Report & Order & Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5656-57, ¶ 29 (1993), *reversed in part on other grounds*, *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996).

²¹ 47 U.S.C. § 543(l)(1)(B)(ii).

²² Petition, Exh. B.

²³ *Id.*, Exh. C.

Tracking Report from the Satellite Broadcasting and Communications Association (“SBCA”) that there are 2,901 DBS subscribers in the two zip codes.²⁴ By dividing the second figure into the first, Bright House concludes that 9 percent of the households in the zip codes live in the franchise area. Application of the 9 percent to the 2,901 DBS subscribers in the two zip codes produces an estimate that there are 261 DBS subscribers in the Lake Alfred franchise area.²⁵ This equates to 17.27 percent of the 1,511 households in the franchise area, which satisfies the 15 percent threshold of the second part of competing provider test.²⁶

9. Lake Alfred challenges Bright House’s data on several grounds. It states that only a small part of one zip code, 33881, is in the Lake Alfred franchise area, and that Bright House should have estimated the number of households in the area not by using 2000 Census data, but by using either certain data it uses to calculate its taxes or nine-digit zip code (“zip+4”) data.²⁷ It also faults Bright House for including in its count of DBS subscribers an unspecified number of households that receive DBS service for free as “courtesy” or “complimentary” accounts,²⁸ as well as households that subscribe to both cable service and DBS service (“dual subscriber households”)²⁹ and seasonal homes.³⁰

10. As the Commission has long recognized, competing provider cases necessarily involve the imperfect match between franchise areas and zip codes.³¹ We have been unwilling to exclude a zip code entirely from our calculations, as Lake Alfred appears to suggest.³² The formula that Bright House uses to calculate how much of zip code 33881 should be allocated to the Lake Alfred franchise area is a reasonable one and has been approved by the Commission in many past decisions, even when most of a zip code lies outside a franchise area.³³ We are unwilling to depart here from this reasonable recognition of the state of available information. Also, as Bright House notes, even if we excluded zip code 33881 totally and reduced the Lake Alfred franchise area to zip code 33850 alone for purposes of this analysis, DBS subscribership would exceed 15 percent and, accordingly, Bright House still establishes competing provider effective competition.³⁴

11. We find no merit in Lake Alfred’s other criticisms of Bright House’s evidence. We have consistently held that 2000 Census data is sufficiently reliable for effective competition determinations, although the Commission has indicated that it will accept more recent household data that is demonstrated

²⁴ *Id.*, Exh. D.

²⁵ *Id.*, Exh. E. Bright House appears to have incorrectly calculated that $.09 \times 2910 = 265.10$.

²⁶ Based on the mathematical error noted in note 25, *supra*, Bright House calculates the percentage of DBS subscribers in the Lake Alfred franchise area to be slightly higher, 17.54%. Petition, Exh. E.

²⁷ Lake Alfred Opposition at 4-7.

²⁸ *Id.* at 5.

²⁹ *Id.* at 8.

³⁰ *Id.* at 7-8.

³¹ See, e.g., *Falcon Cable Systems Co. II*, Memorandum Opinion & Order, 17 FCC Rcd 4648, 4651, ¶ 7 (2002) (“While the level of accuracy in these instances necessarily varies with the shape and size of the zip code area, we accept the Sky Trends data presented by Charter because it is the best available source for determining DBS subscribership in such zip code areas.”).

³² Lake Alfred Opposition at 3.

³³ *Time Warner-Advance/Newhouse Partnership*, Memorandum Opinion & Order, 20 FCC Rcd 5225, 5230 (2005); *Charter Commun., LLC*, Memorandum Opinion & Order, 19 FCC Rcd 7003, 7009 (2004); *Charter Commun., Inc.*, Memorandum Opinion & Order, 19 FCC Rcd 6878, 6883, ¶ 10 (2004).

³⁴ Reply at 6-7 & Exh. 1.

to be reliable.³⁵ Also, Lake Alfred has not shown that the alternative it briefly alludes to (certain tax-related information) has sufficient indicia of reliability and accuracy to justify its use. Although the Commission accepts zip+4 data, it has not expressed a preference for that over five digit zip code data and finds the latter data to be reliable for purposes of determining effective competition.³⁶ Our past decisions have also found that households subscribing to DBS service will count towards the ‘in excess of 15 percent’ minimum of households under the second part of the competing provider test although they have courtesy or complimentary accounts³⁷ and although they are dual subscriber households.³⁸ Such households show the vigor of competition that cable operators face.³⁹ Finally, even if we were to exclude seasonal homes from the number of DBS-subscribing households in the Lake Alfred franchise area and if we were to accept as valid the 4.4 percent estimate of them supplied by Lake Alfred,⁴⁰ the DBS providers’ percentage of households in the franchise area would be 16.5 percent, still above the statutory minimum of in excess of 15 percent.⁴¹

12. The Dundee Franchise Area. The Dundee franchise area lies in part of one five-digit zip code. Bright House obtained a statement from MBC that the zip code contains 1,839 households,⁴² Census data indicating that the Town of Dundee contains 1,123 households;⁴³ and an Effective Competition Tracking Report from the SBCA that there are 344 DBS subscribers in the zip code.⁴⁴ By dividing the second figure into the first, Bright House concludes that 61 percent of the households in the zip code live in the franchise area. Application of the 61 percent to the 344 DBS subscribers in the zip code produces an estimate that there are 210 DBS subscribers in the Dundee franchise area.⁴⁵ This equates to 18.69 percent of the 1,123 households in the franchise area, which satisfies the 15 percent

³⁵ See, e.g., *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 07-397 (“*Coral Gables*”) at ¶ 14 (rel. Jan. 31, 2007), available at 2007 WL 268673; *Adelphia Cable Commun.*, Memorandum Opinion & Order, 20 FCC Rcd 4979, 4982, ¶ 9 (2005); *Cablevision of Raritan Valley, Inc.*, Memorandum Opinion & Order, 19 FCC Rcd 6966, 6968, ¶ 6 (2004). Bright House’s Reply, at 7 n.18, refers to “adjusted and updated 2005 Census household figures,” but it does not appear that it has used such figures.

³⁶ *Time Warner Entertainment Co., LP*, Memorandum Opinion & Order DA 07-196 (“*Germantown*”) at ¶ 6 (rel. Jan. 25, 2007), available at 2007 WL 188118; *Time Warner-Advance/Newhouse Partnership*, Memorandum Opinion & Order, 20 FCC Rcd 5225, 5228, ¶ 11(2005); *Charter Communications, Inc.*, Memorandum Opinion & Order, 19 FCC Rcd 6878, 6881, ¶ 10 (2004).

³⁷ *Comcast Cable Commun., LLC*, Memorandum Opinion & Order (“*Commerce*”), 20 FCC Rcd 20438, 20442 ¶ 12 (2005).

³⁸ *Coral Gables*, *supra* note 35, at ¶ 15; *Mediacom Minnesota LLC*, Memorandum Opinion & Order (“*Minnesota*”), 20 FCC Rcd 4984, 4988, ¶ 13 (2005).

³⁹ *Commerce*, 20 FCC Rcd at 20442, ¶ 12 (“the fact that . . . DBS subscribers receive[] complimentary service enhances, rather than reduces, the cable operator's need to compete for these subscribers. A subscriber receiving free DBS service arguably would have to perceive significant choice and service advantages available through the local cable operator to abandon DBS service in favor of cable service.”); *Minnesota*, 20 FCC Rcd at 4988 ¶ 13 (“the presence of dual subscriber households represents the very essence of MVPD competition that Section 632 of the Communications Act addresses.”).

⁴⁰ Lake Alfred Opposition at 8 & Exh. C at 2.

⁴¹ 261 households reduced by 4.4% is 250 households (after rounding). 250 is 16.54% of 1,511 households.

⁴² Petition, Exh. B.

⁴³ *Id.*, Exh. C.

⁴⁴ *Id.*, Exh. D.

⁴⁵ *Id.*, Exh. E. Bright House appears to have incorrectly calculated that $.61 \times 344 = 210.07$, although the correct figure is 209.84.

threshold of the second part of competing provider test.⁴⁶

13. Dundee challenges Bright House's data using the same grounds as Lake Alfred. We find Dundee's challenges infirm for the reasons stated in paragraphs 10-11 above. We note specifically that even if we were to exclude seasonal homes from the number of DBS-subscribing households in the Dundee franchise area and if we were to accept as valid the estimate of them supplied to us by Dundee⁴⁷ the DBS providers' percentage of households in the franchise area would be 15.5 percent, still above the statutory minimum of in excess of 15 percent.⁴⁸

14. Dundee also challenges Bright House's data on DBS subscription in the franchise area, stating that it conducted "a physical inspection of all the households within the Town's boundaries" and found, rather than Bright House's claimed 210 households subscribing to DBS service, only 152.⁴⁹ This number, if accepted, would lower the percentage of Dundee households subscribing to DBS services below the minimum of 'in excess of 15 percent' required to show competing provider effective competition. Without doubting Dundee's diligence in conducting its inspection, we cannot accept it as the basis for the number of households in the Dundee franchise area subscribing to DBS services. Dundee gives no indication of how its inspection was conducted, including such important matters as whether its inspectors might have missed satellite dishes that were not visible from the street because they were on roofs or had been obscured for aesthetic reasons. In previous cases, we have declined to accept such surveys and have preferred instead to rely on nationwide standard information such as Bright House has supplied,⁵⁰ and we see no reason to depart from that practice here.

15. Conclusion. Bright House has satisfied the second part of the competing provider test in both the Lake Alfred and Dundee franchise areas. Based on the foregoing, we conclude that Bright House has submitted sufficient evidence demonstrating that its cable systems serving those areas are subject to competing provider effective competition. Certain data underlying this conclusion is set forth in Attachment A hereto.

III. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that the Petition for Special Relief filed by Bright House Networks, LLC, for a determination of effective competition in the franchise areas listed in Attachment A **IS GRANTED**.

17. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing Bright House in the franchise areas listed in Attachment A **IS REVOKED**.

⁴⁶ Based on the mathematical error noted in note 45, *supra*, Bright House calculates the percentage of DBS subscribers in the Dundee franchise area to be slightly higher, 18.71%. Petition, Exh. E.

⁴⁷ Dundee Opposition at 5 n.11.

⁴⁸ Dundee claims that its franchise area includes 189 seasonal households. Dundee Opposition at 5 n.11. They represent 16.8% of the 1123 households in the franchise area. If the number of DBS-subscribing households in the area were reduced by 16.8%, from 210 to 175, the latter number would be 15.58% of the total households in the franchise area.

⁴⁹ Dundee Opposition at 5.

⁵⁰ *Germantown*, *supra* note 36, at ¶¶; *Time Warner Entertainment Co., L.P.*, Memorandum Opinion & Order, 18 FCC Rcd 13043, 13045-47, ¶¶ 6, 10 (2003); *Cablevision of Paterson*, Memorandum Opinion & Order, 17 FCC Rcd 17239, 17243, ¶ 7 (2002).

18. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁵¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
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⁵¹ 47 C.F.R. § 0.283.

Attachment A**Bright House Networks, LLC**

Communities	CUID	CPR*	2000 Census Households+	DBS Subscribers+
Dundee	FL0017	18.69%	1,123	210
Lake Alfred	FL0151	17.27%	1,511	261

CPR = DBS penetration or subscribership

+ = See Petition and paragraphs 8 and 12 above.